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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1938

No. **720** 14

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, PETITIONER,

VS.

UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI REQUIRING THE CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT TO CERTIFY TO THE SUPREME COURT, FOR ITS REVIEW AND DETERMINATION, THE CASE OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF JACKSON, IN THE STATE OF KANSAS, A BODY POLITIC AND QUASI PUBLIC CORPORATION, APPELLANT, VS. UNITED STATES OF AMERICA (M-KO-QUAH-WAH, ALLOTTEE No. 193, AN INCOMPETENT INDIAN OF THE PRAIRIE BAND OF POTTAWATOMIE INDIANS), APPELLEE, AND BRIEF IN SUPPORT THEREOF.

THE BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF JACKSON, IN THE  
STATE OF KANSAS, A BODY POLITIC  
AND QUASI PUBLIC CORPORATION,  
*Petitioner.*

DEAN SHRADER,  
*County Attorney of  
Jackson County, Kansas,*  
FLOYD W. HOBBS,  
*Of Counsel.*

By THOMAS M. LILLARD,  
*Of Topeka, Kansas,*  
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## INDEX

	Page
Petition for Writ of Certiorari .....	1-8
Summary Statement of the Matter Involved .....	2
The Sole Question Involved .....	2
The Allegations of the Petition .....	3
The Evidence .....	4
Reasons Relied Upon for Allowance of the Writ .....	5
Brief in Support of Petition for Writ of Certiorari .....	8-22
The Opinion of the Court Below .....	8
Jurisdiction .....	8
Statement of the Case .....	8
Specification of Errors .....	9
Argument .....	9
Conclusion .....	21
Appendix .....	23-26
Article 2 and 3 of the Treaty of November 15, 1861 (12 Stat. 1191) .....	23
Section 5 of the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38; 25 U.S.C., Sec. 348) .....	24
Act of May 8, 1906, c. 2348 (34 Stat. 182, 25 U.S.C., Sec. 349) .....	25
Act of February 26, 1927, c. 215 (44 Stat. 1247) as Amended by the Act of February 21, 1931, c. 271 (46 Stat. 1205, 25 U.S.C., Sec. 352a) .....	25

## Statutes Cited

Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C.A. 347).....	8
15 R.C.L., page 17.....	12
Federal Judiciary Act of 1789, Sec. 34 (28 U.S.C.A., Sec. 351).....	17

## Cases Cited

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S. Ct. 417, 82 L. Ed. 787.....	17, 21
Flemming v. County Commissioners, 119 Kan. 598, 602, 240 Pac. 591.....	17
Glacier County, Montana, v. United States, 99 F. 2d 733.....	5, 19
Kittredge v. Boyd, 137 Kan. 241, 20 P. 2d 811.....	19
Jackson County v. Kaul, 77 Kan. 717, 96 P. 45.....	9, 12
Salthouse v. McPherson County, 115 Kan. 668, 224 Pac. 70.....	11
Seaboard Air Line R. Co. v. U. S., 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664.....	17
School District v. County Commissioners, 127 Kan. 292, 273 Pac. 427.....	12
United States v. Board of Commissioners of Comanche County, Oklahoma, 6 F. Supp. 401.....	18
United States v. Board of County Commissioners of Pawnee County, Oklahoma, 13 F. Supp. 641.....	19
United States v. Lewis County, Idaho, 95 F. 2d 236.....	5, 20
United States v. Nez Perce County, Idaho, 95 F. 2d 232.....	5, 13, 20

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VS.

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*To the Honorable The Supreme Court of the United States:*

The petition of The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, appellant, respectfully shows to this Honorable Court:

## **SUMMARY STATEMENT OF THE MATTER INVOLVED.**

The United States of America instituted this action December 23, 1936, in the District Court of the United States for the District of Kansas under the direction of the Attorney General of the United States to recover a judgment against The Board of County Commissioners of Jackson County, Kansas, on account of taxes collected by said County during the years 1919-1933, inclusive, upon farm land in Kansas which had been allotted to a certain Indian under the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U.S.C.A. 348). (For text of Act, see Appendix B.) The amount claimed in the petition was \$3,073.70, being the principal amount of taxes paid by the Indian, plus accrued interest. The amount of taxes actually paid was \$1,966.96, and the interest claimed amounted to \$1,106.74, which made up the total prayed for as above stated.

The District Court entered judgment in favor of the plaintiff for the amount of \$3,277.49, which included interest up to the 17th day of September, 1937, the date of the rendition of the judgment, together with interest thereafter at the rate of six per cent per annum until paid. An appeal was perfected to the Circuit Court of Appeals for the Tenth Circuit, in which the judgment of the District Court was affirmed. (Tr. 61-72.) A petition for rehearing was filed (Tr. 73), which was thereafter denied.

### **(1) The Sole Question Involved.**

The action was apparently brought under the authority of Section 24 of the Judicial Code, Sub-section (1), as amended (28 U.S.C.A. 41 (1)). The authority of the United States to bring this action on behalf of the Indian, M-Ko-Quah-Wah,

is not challenged; nor is the correctness of the judgment of the District Court in permitting recovery of the principal amount of the tax money paid by the Indian to the County now a matter of issue here. The sole contention is that the District Court was in error in rendering judgment in favor of the United States and against The Board of County Commissioners of Jackson County, Kansas; *for interest* on the principal amount of the taxes collected from the Indian (Tr. 13-14), it having been stipulated by and between the parties that if recovery of such interest could be had it would be in the amount of \$1,311.36. (Tr. 43.)

There are a number of Indian allottees in Jackson County, Kansas, from whom taxes have been collected in a manner similar to the taxes collected from the Indian, M-Ko-Quah-Wah, in the present case. The decision in this case will therefore determine as to whether many others, along with the Indian involved in this case, may collect interest on back taxes where a refund of tax payments is properly recoverable.

## (2) The Allegations of the Petition.

The petition filed by the Government (Tr. 1 to 5, inc.) alleges that the land in Jackson County, Kansas, was allotted to the Indian in question; that on August 15, 1893, a trust patent was issued to her covering the premises in question under the Fifth Section of the General Allotment Act (see Appendix B) hereinbefore referred to; that in accordance with said Allotment Act the trust patent so issued provided that the land should be held by the Government for a period of twenty-five years in trust for the sole benefit and use of the Indian or her heirs; that at the expiration of said period the United States would convey the land by patent to the Indian or her heirs in fee, discharged of said trust and free from all charges or encumbrances whatsoever.

The petition of the Government further alleges that on April 17, 1918, a patent in fee was issued to the Indian without her consent, which on its face purported to convey the land in fee simple to the Indian allottee. The taxes sought to be recovered as set out in the petition of the Government were those paid for the years from 1919 to 1933, inclusive, in the total amount as hereinbefore stated.

The petition further alleges that the fee simple patent was cancelled by the Government on May 31, 1935, under authority of the Act of Congress approved February 26, 1927, 44 Stat. L. 1247, as amended by the Act of February 21, 1931, c. 271, 46 Stat. L. 1205 (25 U.S.C.A. 352a) (For text of Act, see Appendix D.)

### (3) The Evidence.

The evidence shows that the Indian did not request the issuance of this fee patent; that the taxes were paid for her by her husband, or by the administrator of her husband's estate, from her funds, or funds that had been accumulated by herself and her husband from the land so patented to her. (Tr. 35-36-37.) The Government at no time during the litigation has contended that the taxes were paid by the Indian, or on her behalf, under formal protest as provided by statutes of the State of Kansas.

The evidence introduced on behalf of the Government shows that a Government Competency Commission investigated the allottee Indian in December of 1917, the year prior to the issuance of the fee patent referred to above. The report of this Commission (Tr. 29-30) shows that at that time the Indian and her husband had a well improved home, a large barn, wells, windmills, and other farm buildings; an automobile, ten or fifteen head of horses and mules, a large herd of cattle, including a bunch of thoroughbred

Galloways. The Commission concluded that the Indians were very competent people, and so advised the Office of Indian Affairs, which office, in turn, recommended that the fee patent be issued. (Tr. 30.) The County officials did not begin to levy taxes until the year after this fee patent was issued, and no taxes were levied or collected after the fee patent was cancelled.

B.

**REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT**

1. The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case, 100 F. 2d 929 (Tr. 61 to 72, inc.), as to the right of the Indian allottee to recover interest on taxes erroneously assessed and collected against her by the defendant, Jackson County, Kansas, is directly in conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in the case of *United States v. Nez Perce County, Idaho*, 95 F. 2d 232, and in direct conflict with a similar case in the same Circuit, entitled *United States v. Lewis County, Idaho*, 95 F. 2d 236, and in direct conflict with the decision of the United States Circuit Court of Appeals for the Ninth Circuit when both of the cases just referred to were before that Court on consolidated rehearing, as reported in 95 F. 2d 238; also in direct conflict with the decision of the Ninth Circuit Court of Appeals in the case of *Glacier County, Montana, v. United States*, 99 F. 2d 733. The Circuit Court of Appeals for the Ninth Circuit in the aforesaid cases held upon facts practically identical with those existing in the present case that the Government was not entitled to recover interest on behalf of Indian allottees on taxes which had been paid to the defendant counties over a period of years. The decision of the Circuit Court of Appeals for the Tenth Circuit in this case is an erroneous decision, the de-

cisions of the Circuit Court of Appeals for the Ninth Circuit being the correct legal conclusion to be applied.

2. The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case, as above referred to, as to the right of the Government to recover *interest* for an Indian allottee on taxes erroneously collected from her, by holding that such interest charges could be collected, is a decision on an important question of local law in a way which is in conflict with applicable local or state decisions.

3. The decisions of the Circuit Court of Appeals for the Tenth Circuit in the present case, as above referred to, by holding that *interest* may be recovered by the Government on behalf of an Indian allottee from a county, which is a political subdivision of a state, involves an important question of federal law which has not been, but which should be settled by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record, and all proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 1728, *The Board of County Commissioners of the County of Jackson, in the State of Kansas, a body politic and quasi public corporation, Appellant, v. United States of America (M-Ko-Quah-Wah, Allottee No. 193, an Incompetent Indian of the Prairie Band of Pottawatomie Indians), Appellee*, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States, and that the judgment herein of said United States Circuit Court of Appeals be reversed by his Court, and for such further relief as to the court may seem proper.

Copies of the transcript of the record in this case in the Circuit Court of Appeals for the Tenth Circuit are filed herewith in conformity with Rule No. 38 of this Honorable Court.

✓ THE BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF JACKSON, IN THE  
STATE OF KANSAS, A BODY POLITIC  
AND QUASI PUBLIC CORPORATION,  
*Petitioner.*

By THOMAS M. LILLARD,  
Of Topeka, Kansas,  
*Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

### I.

#### THE OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Tenth Circuit (Tr. 61-72), sought to be reviewed was handed down on December 10, 1938. It is reported in 100 F. 2d 929 (Advance Sheet No. 7). Petition for rehearing was filed in said Circuit Court of Appeals on January 9, 1939. (Tr. 75-77.) This petition was denied on January 23, 1939. (Tr. 79.)

### II.

#### JURISDICTION

The ground on which the jurisdiction of this Court is invoked is the Judicial Code 240, as amended by Act of February 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U.S.C.A. 347), providing for the issuance of writs of certiorari by the Supreme Court of the United States to review judgments of the Circuit Courts of Appeals.

### III.

#### STATEMENT OF THE CASE

The nature of the case and the ruling of the Circuit Court of Appeals for the Tenth Circuit is set forth in the foregoing petition (Point A, pp. 2-5) which is adopted as a part of this brief.

## IV.

**SPECIFICATION OF ERRORS.**

The Circuit Court of Appeals below erred:

1. In holding that the United States of America on behalf of M<sub>o</sub>-Ko-Quah-Wah could recover *interest* on taxes which she paid to Jackson County, Kansas, during the time she held a fee patent from the Government to the land which was the subject of the taxes, and such holding is contrary to decisions of the Ninth Circuit Court of Appeals in cases practically identical in facts and circumstances.

2. In holding that the United States Government had the right to recover *interest* for an Indian allottee on taxes collected on Kansas land, which decision involves an important question on local law contrary to and in conflict with decisions of the Supreme Court of the State of Kansas.

## V.

**ARGUMENT.**

**Unless the Government is Held Entitled to Interest as a Strict Matter of Legal Right as by Force of Statute or Contract, it is in no Position to Demand Interest Payments From the County on Behalf of an Indian Allottee as Damages.**

There is no statute in the State of Kansas which authorizes the collection of interest from a county. The Kansas Supreme Court holds that a county is a political subdivision of the State.

The Supreme Court of the State of Kansas in the case of *Jackson County v. Kaul*, 77 Kan. 717, 96 P. 45, held as follows, as shown by the syllabus of the case, as prepared by the Court:

"The general interest statute allowing creditors to receive in the absence of contract, interest upon money after it becomes due cannot be interpreted to impose a liability upon a county, which is a political subdivision of the state, organized for purely governmental purposes and endowed with *quasi*-corporate powers only; and, in an action against county officers to recover taxes wrongfully exacted over the protest of the taxpayer and through the compulsion of a tax warrant, interest on the money from the time it was paid (if then being due) cannot be recovered."

In the opinion, referring to the general statute of the State of Kansas which permits creditors to receive interest at the rate of six per cent per annum when no other rate of interest is agreed upon, for any money after it becomes due (Sec. 41-101, G.S. Kans. 1935), the court said:

"The word 'creditors' is here used in the broad sense of those who have the legal right to demand and receive the payment of money, and includes the plaintiff in the transaction under investigation. 'The money having been wrongfully extorted from the plaintiff by the threatened seizure of his property under the tax warrant then in the sheriff's hands for execution, the county had no right to retain it for a single day. It owed the plaintiff the duty to make restitution at once. (See 22 Cyc. 1506.) No demand was necessary, because the money had been exacted over the plaintiff's protest and denial of liability. Therefore the money was 'due' as soon as the county had taken it."

"So far the statute has been looked at from the creditor's side. Considered from the viewpoint of the debtor, it imposes a duty and a liability outside of contract which would not otherwise exist. Do its merely general terms extend to counties? The general rule that the state is not bound by statutes limiting rights and imposing burdens unless it be expressly named or be intended by necessary implication is familiar. (*The State v. Book*

Co., 69 Kan. 1, 24, 76 Pac. 411, and authorities there cited.) To bind the state by an implication it must be one that is unavoidable. If there be a doubt upon the subject, that doubt must be resolved in favor of the state. (*The State v. School District*, 34 Kan. 237, 242, 8 Pac. 208.)

"Counties are mere political subdivisions of the state. (*Commissioners of Shawnee County v. Carter*, 2 Kan. 115.) They are mere instrumentalities of the state in the exercise of its governmental functions, and are given corporate power only so far as may be necessary to aid those functions. They are only *quasi*-corporations (*Com. of Neosho Co. v. Stoddart*, 13 Kan. 207, 210; *Freeland v. Stillman*, 49 Kan. 197, 207, 30 Pac. 235; *In re Dalton*, 61 Kan. 257, 264, 59 Pac. 336, 47 L.R.A. 380; *The State v. Wilson*, 65 Kan. 237, 238, 69 Pac. 172), and are clearly distinguished from municipal organizations like cities, which are given far greater powers and are endowed with much larger measures of corporate life. (1 Dill. Mun. Corp., 4th ed., No. 25; 11 Cyc. 341 *et seq.*) This suit can be maintained only because it relates to a subject which falls strictly within the limits of expressly granted authority. If it does not, the county cannot be sued any more than the state itself. When the statutes have made no distinction a county is entitled to the same privileges and immunities of the state."

As indicated, the collection of interest from the county was denied. As stated above, there is no other statute in Kansas which evidences the consent of that state to a recovery of interest upon tax money which has been collected erroneously.

In the case of *Salthouse v. McPherson County*, 115 Kans. 668, 224 Pac. 70, it is held:

"A judgment against a county in an action for the repayment of a void tax does not bear interest, the statute providing in general terms that judgments shall bear interest not applying where the state or county is the debtor."

In the opinion, 15 R.C.L., page 17, is cited. This text reads as follows:

"It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the legislature or by a lawful contract of its executive officers made within the scope of their duly constituted authority. This principle applies to bonds, claims, judgments, and warrants. The theory upon which the rule is based is that whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government in this respect has been declared to be demanded by public policy. A county is generally regarded as but an arm or agent of the state, and not liable for interest, in the absence of an express agreement to pay it."

This rule is also followed in the case of *School District v. County Commissioners*, 127 Kan 292, 273 Pac. 427, where it was held:

"Interest may not be recovered from a county except through express provision of statute."

This, then, is the rule in Kansas concerning the collection of interest from counties, which, as is demonstrated by the case of *Jackson County v. Kaul*, *supra*, are regarded as instrumentalities of the state. The ruling of the highest court in Kansas is to the effect that there is no applicable statute in Kansas which authorizes the collection of interest on judgments for the refund of tax money erroneously collected. A similar situation as to law exists in the State of Idaho. In that state there is a statute which allows interest on taxes

refunded after erroneous collection, but there is no statute of that state which evidences the consent of the state to a recovery of interest in a case such as is presented here. Under such a state of facts and circumstances, the United States Circuit Court of Appeals for the Ninth Circuit held that interest could not be recovered by the United States on behalf of an Indian ward living in Idaho. The facts there were practically identical to the facts in the present case. See *United States v. Nez Perce County, Idaho*, 95 F. 2d 232. On page 236 of the opinion in that case the following appears:

"The recovery of interest on the amounts paid as taxes should not be allowed. *Interest may not be recovered upon money due from the sovereign unless some positive statute or contract of the state evidences its consent to pay it.* *United States v. North Carolina*, 136 U.S. 211, 10 S. Ct. 920, 34 L. Ed. 336; *United States v. North American Transp. & Trading Co.*, 253 U.S. 330, 336, 40 S. Ct. 518, 64 L. Ed. 935; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664. The county is a political subdivision of the state, and as such would seem to be entitled to this form of immunity. While the Code provision (section 61-1902, Idaho Code 1932) allows interest on taxes refunded after erroneous collection, the statute has no application in suits for refund brought in the federal courts. We are not aware of any statute of the State of Idaho which evidences the consent of that state to a recovery of interest in a situation such as the one presented here." (Italics ours.)

A rehearing was granted in that case on the sole contention that the court committed error in denying to the Government the recovery of interest. The opinion denying a rehearing is reported in 95 F. 2d 238, beginning on page 239 the court uses the following language:

"Unless the government is here entitled to interest as a strict matter of legal right, as by force of statute or contract, it is in no position to demand interest as damages. Its situation in that respect is conspicuously lacking in equity. The amended bills in these cases were filed in September, 1935. This was nine or ten years after the last payment of taxes had been made by the Indians, and the payments themselves had extended over a prior period of four or five years. Thus interest is sought on payments made as long as fourteen years before the commencement of the suits, and in no instance has the delay in seeking recovery been less than nine years. These delays are in no manner traceable to fault on the part of the counties or their governing officials, but are due to inexcusable laches on the part of the government itself. Again, the counties were in no way responsible for the issuance of the fee patents to the Indians in the first place. This was an act of the government itself, occasioned by facts and circumstances peculiarly within the knowledge of those representing it. The local authorities had a right to rely upon the conduct of the government in the issuance of the patents, and were by this conduct induced to believe that the lands were subject to tax. The good faith of the counties and of their officers and governing boards is not open to question. For many years their budgets were formulated and their levies were fixed on the assumption—certainly not an unreasonable one—that these patented lands were part of the whole body of property subject to tax. Were the rights of the United States alone to be considered in these cases, its conduct might properly be held to estop it from any recovery at all. Nor, as indicated in the original opinions, is there a showing in either case that the Indian paid the taxes under protest. We have held that the United States is not precluded on this account from recovering the principal of the tax, but it does not follow that the Indians, having paid the taxes without protest, are themselves equitably entitled to interest by way of damages because of the retention of the moneys so paid. Nor is

there any showing that the counties have earned or received interest on the moneys illegally exacted.

"Under all the circumstances, it is clear that the government is entitled to no more than a refund of the principal of these payments. The allowance of interest, even if normally recoverable, would be an abuse of discretion."

In the present case, the petition of the Government was filed on December 23, 1936, fifteen years after the first payment of taxes was made, and more than two years after the last item of taxes had been paid. Thus interest is sought on payments made as long as fifteen years before the commencement of the suit. As in the opinion last above quoted from, the delay in attempting to collect the taxes is in no manner traceable to fault, on the part of the county or its officers, but is due alone to the laches on the part of the Government. Also, as in the foregoing case, the county here was in no way responsible for the issuance of the fee patent to the Indian allottee. That was an act of the Government, the plaintiff in the case, occasioned and prompted by facts and circumstances which were peculiarly within the knowledge of the Government officials.

We submit the logic of the court in the above case, where it holds that under such a situation the local authorities had a right to rely upon the conduct of the Government in the issuance of the patent and that they are warranted in believing the lands were properly taxable, is sound. There was no evidence in this case which in any way questioned the good faith of the county officers, and there is nothing to show that they were arbitrary or unreasonable in making the tax levies against the property of the Indian in question. As in the foregoing case, they undoubtedly made their budgets and the levies were fixed upon the very reasonable assumption that these lands having been patented in fee by

the Government were subject to taxation. There is no showing in the case that the county has ever received interest on the tax moneys collected from the allottee in question. In fact, the evidence is directly to the contrary, in that it shows the county officials largely disbursed the money to state, townships and school districts, the county having been the collecting agency for those branches of the state government.

There are many Indians in Jackson County, Kansas, for whom the Government has not yet filed suit. If the interest rule as announced and found by the Circuit Court of Appeals for the Tenth Circuit is permitted to stand, many other large items of interest of this character will be charged to, and collected from Jackson County, Kansas. The county is rural in its characteristics. The farmers and few business men residing therein are in very low financial condition. If these citizens are required to pay interest on these ancient tax levies, which were occasioned by errors on the part of the Government in the issuance of fee patents to Indians, an extraordinary and unreasonable additional financial burden will be cast upon the Kansas citizens to the unreasonable advantage of Indian allottees. So far as the record in this case is concerned, the Indian here involved was, and is, financially well fixed. She was found by the Competency Commission sent out by the Government to be fully competent to handle her own affairs.

The Circuit Court of Appeals for the Tenth Circuit in the present case in its opinion (Tr. 61-72) cites authorities which are not appropriate to the conclusion ultimately reached by the court on the question of interest. Condemnation cases, and cases where food, fuel and supplies were requisitioned by the government are cited. But the authorities make a distinction between cases where property has been taken and compensation is claimed under the Fifth Amend-

ment to the United States Constitution, and cases in which refunds of tax moneys are sought. See *Flemming v. County Commissioners*, 119 Kan. 598, 602, 240 Pac. 591; *Seaboard Air Line R. Co. v. U. S.*, 261 U.S. 299, 304, 43 S. Ct. 354, 355, 67 L. Ed. 664.

In the opinion in the present case, the Circuit Court of Appeals cites Section 34 of the Federal Judiciary Act of 1789, 28 U.S.C.A., Sec. 351, which provides that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, the inference from such citation being that the rights in question in the present action are governed by provisions of the Federal Constitution, treaties or statutes. However, there are no constitutional provisions or statutes, or provisions of the treaty involved in the present case (Articles 2 and 3 of Treaty of November 15, 1861 [12 Stat. 1191, See Appendix A]) which require the payment of interest by states or subdivisions of states where taxes are erroneously collected. We are conceding the correctness of the opinion of the District Court in granting a refund of the principal amount of taxes paid. That is as much as the treaty involved in this case contemplates. It simply says that the land shall be free from taxation. If the taxes are refunded, it will be free from taxation. There is nothing in the treaty which says that interest may also be charged. The Circuit Court of Appeals in the opinion in the present case attempts to distinguish the case of *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 417, 82 L. Ed. 787, by referring particularly to the exception as announced in the Federal Judiciary Act referred to above. The quotation in the opinion from the *Erie* case in that respect is as follows:

"Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. \* \* \* There is no federal general common law."

Apparently the Circuit Court of Appeals takes the view that the exception just quoted fits the present situation, but there are no federal constitutional provisions or federal statutes which authorize the collection of interest in cases of this character. From this it is apparent that the conclusion of the Tenth Circuit Court of Appeals in support of its decision as to the interest item is not sustained by the clear logic and reasoning that was adduced by the Ninth Circuit Court of Appeals in the Idaho and Montana cases above referred to.

As a matter of fact, the judgment of the Circuit Court of Appeals for the Tenth Circuit in this case does not even agree with two prior judgments in almost identical cases as decided by District Judges within the same Circuit. In the case of *United States v. Board of Commissioners of Comanche County, Oklahoma*, 6 F. Supp. 401, District Judge Vaught decided in a case almost identical in its facts with the case now before the court that interest could not be recovered on the taxes sued for. The taxes in that case were paid under protest. The court in that opinion, on page 403, states:

"Where taxes are paid under protest, the collecting authority can only hold them in trust, and since Comanche County would be regarded in this case as a trustee, this court knows of no provision for the payment of interest except by taking the interest from some other fund whose application had been provided by statute."

Judgment was thereupon entered for the amount of the taxes without interest.

Later, the District Court of Oklahoma in the case of *United States v. Board of County Commissioners of Pawnee County*,

*Oklahoma*, 13 F. Supp. 641, in an opinion written by Judge Kenamer, reached a conclusion in another case exactly in line with the case now before this court, that interest could not be collected. The taxes in that case were not paid under formal protest, but the court held that the judgment for the Indian plaintiff should not carry interest.

These decisions are in line with the case of *Kittredge v. Boyd*, 137 Kan. 241, 20 P. 2d. 811. Beginning on page 243 of the opinion, it is said:

"That is the question whether interest should be paid on the protested sums during the time the state treasurer has held them pending an authoritative adjudication on the legality of the statute. In our opinion the state treasurer served as official stakeholder for all parties concerned. He has no fund to pay interest. While we have held that plaintiffs had no adequate remedy at law, and in consequence they could rightfully bring mandamus in these cases, mandamus was not the only extraordinary procedural redress—an injunction or mandatory injunctive proceeding in the district court, and could thereby have procured an adjudication on the state's claim to these illegal tax exactions without having paid over the money at all. The procedure they did follow was simpler and more expeditious, but it does not entitle them to interest on their funds while they have been in the hands of the state treasurer."

Thus it is that as against cases of exact similarity the decision here of the Circuit Court of Appeals for the Tenth Circuit stands out alone, and unsupported by other federal authorities. The court was clearly in error in holding that interest charges could be properly collected on the taxes paid by the Indian allottee.

Another very late case by the Ninth Circuit Court of Appeals where the facts are practically identical with the facts in the present case is that of *Glacier County, Montana, v. United*

*States*, 99 F. 2d 733. That was an action by the Government on behalf of an Indian ward to recover taxes which had been assessed and collected during the time when the trust period as provided by the General Allotment Act of 1887 was still running. The court adhered to its earlier decisions cited hereinbefore in holding that while the taxes should be refunded to the Indian, interest could not be collected from the County. This decision was handed down on October 15, 1938, indicating the clear intent of the United States Circuit Court of Appeals for the Ninth Circuit to adhere to its earlier decisions, and to regard the holding of no interest liability as established law.

This being a brief in support of petition for a writ of certiorari, rather than, on the complete case, we will not go further than to suggest the foregoing shows conclusively that the exact reasons for the granting of certiorari as set out in Rule 38 of this court, are present here as follows:

First: The Circuit Court of Appeals for the Tenth Circuit has rendered a decision in the present case directly in conflict and irreconcilable to the decisions of the Circuit Court of Appeals for the Ninth Circuit in the cases of *United States v. Nez Perce County, Idaho*, and *United States v. Lewis County, Idaho, supra*, where the identical question as to the right of recovery of interest was involved. Both courts, as shown by the opinions, have given careful consideration to the question, reaching directly opposite conclusions; both courts cite decisions of this court in support of their decisions. The opinion of the Tenth Circuit Court of Appeals requires the county to pay interest on tax moneys, some of which was collected as much as fifteen years prior to the date of the bringing of the suit. The total interest charges amount to almost as much as the principal amount of the taxes paid. The opinion of the Ninth Circuit Court of Appeals holds that outside and beyond the fact that interest may not be

collected as a matter of law, to require such payment would work a grave inequity against the court and that interest may not therefore be collected as damages. Thus there is a direct conflict, and it is apparent that the Circuit Court of Appeals for the Ninth Circuit reached the correct result.

Second: The decision of the Circuit Court of Appeals for the Tenth Circuit in the present case requiring the payment of interest is a decision on an important question of local law, which is contrary to and in conflict with the laws of the State of Kansas in which the land in question is situated, and where the case was filed and tried in the Federal District Court. The rule announced in the case of *Erie R. Co. v. Tompkins, supra*, requires that the law of the state must be applied where the Federal Constitution, Federal Statutes or Federal Treaties do not provide to the contrary. We submit the rule announced by the state court as shown heretofore is not contradictory to any provisions of the Federal Constitution, Federal Statutes or of any Federal Treaty involved in this case and that it should control.

### CONCLUSION

It is a serious matter when Circuit Courts of Appeal reach different conclusions on identical situations. It leaves the law in such an unsettled condition that litigants may not know their rights. This case also presents a serious situation to Jackson County, Kansas, a rural community, whose indebtedness to Indians will be nearly doubled if the erroneous ruling announced by the Tenth Circuit Court of Appeals is adhered to. It results also in a very apparent discrimination against Indians in the Idaho jurisdiction, in that they are not permitted to recover interest on taxes erroneously assessed and collected from them; whereas, if the present ruling

is permitted to stand, the Kansas Indians will have that advantage. Over and above this, it works a grave inequity where the county was misled by a mistake on the part of the Government in issuing a fee patent, which was not cancelled until after the last portion of taxes which are the subject of this litigation had been collected. The Indian in question here, as found by the Competency Commission, is capable of attending to her own affairs as is demonstrated by her financial soundness. It will afford her an unneeded advantage to the grave detriment of the taxpayers of Jackson County. These considerations demonstrate that two very distinct grounds for the granting of certiorari as set out in Rule 38 of this court, are readily available here:

It is, therefore respectfully submitted that this cause is one calling for the exercise by this court of its supervisory powers in ordering that the decree and opinion of the United States Circuit Court of Appeals for the Tenth Circuit may be examined, and to such end a writ of certiorari should be granted, and that this court should review the opinion of said Circuit Court of Appeals and reverse it.

Respectfully submitted,

THE BOARD OF COUNTY COMMISSIONERS  
OF THE COUNTY OF JACKSON, IN THE  
STATE OF KANSAS, A BODY POLITIC  
AND QUASI PUBLIC CORPORATION,

*Petitioner.*

By THOMAS M. LILLARD,  
*Counsel for Petitioner.*

## APPENDIX

## A

Articles 2 and 3 of the Treaty of November 15, 1861 (12 Stat. 1191):

ARTICLE 2. It shall be the duty of the agent of the United States for said tribe to take an accurate census of all the members of the tribe, and to classify them in separate lists, showing the names; ages, and numbers of those desiring lands in severalty, and of those desiring lands in common, designating chiefs and head-men, respectively; each adult choosing for himself or herself, and each head of a family for the minor children of such family, and the agent for orphans and persons of an unsound mind. And thereupon there shall be assigned, under the direction of the Commissioner of Indian Affairs, to each chief at the signing of the treaty, one section; to each head-man, one-half section; to each other head of a family, one-quarter section; and to each other person eighty acres of land, to include, in every case, as far as practicable, to each family, their improvements and a reasonable portion of timber, to be selected according to the legal subdivision of survey. When such assignments shall have been completed, certificates shall be issued by the Commissioner of Indian Affairs for the tracts assigned in severalty, specifying the names of the individuals to whom they have been assigned, respectively, and that said tracts are set apart for the perpetual and exclusive use and benefit of such assignees and their heirs. Until otherwise provided by law, such tracts shall be exempt from levy, taxation, or sale, and shall be alienable in fee or leased or otherwise disposed of only to the United States, or to persons then being members of the Pottawatomie tribe and of Indian blood, with the permission of the President, and under such regulations as the Secretary of the Interior shall provide, except as may be hereinafter provided. And on receipt of such certificates, the person to whom they are issued

shall be deemed to have relinquished all right to any portion of the lands assigned to others in severalty, or to a portion of the tribe in common, and to the proceeds of sale of the same whensoever made.

ARTICLE 3. At any time hereafter when the President of the United States shall have become satisfied that any adults, being males and heads of families, who may be allottees under the provisions of the foregoing article, are sufficiently intelligent and prudent to control their affairs and interests, he may, at the request of such persons, cause the lands severally held by them to be conveyed to them by patent in fee-simple, with power of alienation; and may, at the same time, cause to be paid to them, in cash or in the bonds of the United States, their proportion of the cash value of the credits of the tribe, principal and interest, then held in trust by the United States, and also, as the same may be received, their proportion of the proceeds of the sale of lands under the provisions of this treaty. And on such patents being issued and such payments ordered to be made by the President, such competent persons shall cease to be members of said tribe, and shall become citizens of the United States; and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens: *Provided*, That, before making any such application to the President, they shall appear in open court in the district court of the United States for the district of Kansas, and make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests, that they have adopted the habits of civilized life, and have been able to support, for at least five years, themselves and families.

## B

Section 5 of the General Allotment Act of February 8, 1887, c. 119 (24 Stat. 38, 25 U. S. C., Sec. 348):

Upon the approval of the allotments provided for in sections 331 to 334, inclusive, and 336 by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period, the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: *Provided*, That the President of the United States may in any case in his discretion extend the period. \* \* \*

## C

Act of May 8, 1906, c. 2348 (34 Stat. 182, 25 U. S. C., Sec. 349):

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; \* \* \* and thereafter, all restrictions as to sale, encumbrance, or taxation of said land shall be removed \* \* \*.

## D

Act of February 26, 1927, c. 215 (44 Stat. 1247) as amended by the Act of February 21, 1931, c. 271 (46 Stat. 1205, 25 U. S. C., Sec. 352a):

— The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust

patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent has never been issued.

